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**United States District Court
Southern District of California**

10 || (Hon. Nita L. Stormes)

19 Material witness Ara Hakobyan [the "Material Witness"], by and through his counsel, attorney
20 Ned Lynch, submit this memorandum of points and authorities in support of his motion to take his
21 videotaped deposition and thereafter be released from custody.

Case Overview

On April 26, 2008 the Material Witness was detained in the Southern District of California in relation to the charges brought against Defendants Ara E. Avetyants, Ashot Barsegian, and Arsen Grishai Motivosyan for violating 8 U.S.C. § 1324 by attempting to smuggle the Material Witness into the U.S. illegally as an undocumented alien. The Material Witness is allegedly being detained as material witness under 18 U.S.C. § 3144.

1 The Material Witness has been unable to arrange for his release on bail, and by the time this
2 motion will be heard he will have been in custody for nearly 7 weeks. However, it is unnecessary
3 to detain the Material Witness much longer, because his testimony can be preserved by a videotaped
4 deposition. The Material Witness therefore requests the court order the videotaped deposition to
5 preserve his testimony, and that he be released immediately thereafter from the custody of the U.S.
6 Marshal after the deposition is concluded.

9 Title 18, section 3144 of the United States Code provides:

10 "No material witness may be detained . . . if the testimony of such witness can
11 adequately be secured by deposition, and if further detention is not necessary to
 prevent a failure of justice."

12 Depositions of material witnesses may be used at trial in criminal cases, so it is only in
13 exceptional circumstances, where the interests of justice will be denied, that a videotaped deposition
14 is not appropriate. [See IIRIRA § 219 (admissibility of videotape depositions); see also, United
15 States v. King 552 F.2d 833 (9th Cir. 1976) (cert. denied, 430 U.S. 966).] The defendant may be
16 present at the videotaped deposition and therefore have a full and fair opportunity to cross-examine
17 the witness. The videotape provides a sufficient indicia of reliability to afford the trier of fact a
18 satisfactory basis for evaluating the truth of a statement. [Dutton v. Evans, 400 U.S. 74, 89 (1970).]

19 The burden is on the objecting party to show that the use of deposition testimony will deny
20 defendant a fair trial and that live testimony would somehow be significantly different. [United
21 States v. Humberto Rivera, 859 F.2d 1204, 1208 (4th Cir. 1988).]

22 The Material Witness should not be detained indefinitely because his testimony can be
23 adequately secured by deposition. In terms of what the Material Witness can testify, this is a routine
24 alien-smuggling case. Based on interviews with the Material Witness and the reports submitted by
25 the arresting agency, the facts to which the Material Witness is competent to testify are straight-
26 forward. (See paragraph 6 of the declaration of Attorney Ned Lynch submitted with these points and
27 authorities.)

1 The Material Witness has no criminal charges pending against his relating to this matter, and
 2 he has already spent a considerable amount of time in custody (almost 7 weeks at the motion hearing
 3 date). The Material Witness has no prospects of being released on bail, which has been set at
 4 \$30,000. There is also an additional immigration hold on him. The Material Witness and his family
 5 (a wife and two minor children) are enduring emotional, mental, and economic hardships from his
 6 indefinite incarceration without being charged with a crime. (See paragraphs 3 and 4 of the
 7 declaration of Attorney Ned Lynch submitted with these points and authorities.)

8 Moreover, the Material Witness and his counsel have not been informed by any party to this
 9 case of a specific reason why further detention of the witness is necessary *to prevent a failure of*
 10 *justice*. (See paragraph 5 of the declaration of Attorney Ned Lynch submitted with these points and
 11 authorities.)

12 **The Material Witness In NOT Required To Show Exceptional Circumstances Or
 13 Hardship Exist For The Court To Order The Videotaped Deposition**

14 Under **Rule 15(a)(1)** a party must establish exceptional circumstances exist if the party wants
 15 to take the deposition of a witness. A person designated as material witness is not a party to the case.
 16 Neither party to this case--the government or the defendant--is moving the court for this deposition.
 17 This motion is brought by the material witness only.

18 Under **Rule 15(a)(2)** a witness may bring a motion to take his or her deposition without any
 19 showing of exceptional circumstances, or hardship. Federal Rules of Criminal Procedure, Rule 15.

20 The material witness has proffered facts through his attorney's declaration regarding the
 21 hardships he and his family are enduring during his indefinite incarceration only to inform and
 22 remind the court and the parties that an uncharged person remains in custody, and that incarceration
 23 has real impact on the Material Witness and others. These facts are not being offered to show
 24 exceptional circumstances exist to order the deposition, because no such showing is required.

25 The court must grant the motion for the Material Witness to be deposed even if no
 26 exceptional circumstances exist.

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Conclusion

The Material Witness requests the court grant his motion and set his videotaped deposition at the earliest possible date so he can be released from custody immediately thereafter.

Dated: May 18, 2008

S/Ned Lynch

Ned Lynch, attorney for the Material Witness
E-mail: nedlynch@aol.com

Exhibit A

Sample Draft Of The Order

United States District Court

Southern District of California

UNITED STATES OF AMERICA,) Criminal Case No. _____
Plaintiff,)
v.) **Deposition Order For A Material Witness**
_____,)
Defendant.)

13 Upon motion of material witness _____ [the "Material Witness"],
14 by and through his attorney, Ned Lynch, by the appearance of the parties and their respective
15 counsel, and apparent good cause:

Order

17 1. Unless he is otherwise released from custody of the U.S. Marshal, the Material
18 Witness shall be deposed on _____, at _____ a.m/p.m. The deposition
19 will be held at the U.S. Attorney's Office in San Diego, California. An employee of the U.S.
20 Attorney's Office shall serve as the videotape operator.

21 2. All parties shall attend the deposition. A U.S. Marshal or other designated
22 government agent(s) shall bring the Material Witness to the deposition. If the defendant is in
23 custody, he or she shall be brought separately to the deposition. A marshal or other government
24 agent(s) shall remain present during the entire proceeding.

25 3. The United States Attorney's Office shall arrange for a court-certified interpreter to
26 be present for the Material Witness, if necessary. The cost of the interpreter for the Material Witness
27 will be borne by the United States. See 28 U.S.C. § 1827(c)(2).

1 4. If a defendant needs an interpreter independent of the Material Witness' interpreter
2 (if any), defense counsel will arrange for a court-certified interpreter to be present. The cost of a
3 separate interpreter shall be paid by the court.

4 5. The U.S. Attorney's Office shall arrange for a certified court reporter to be present.
5 The court reporter shall stenographically record the testimony and serve as a notary and preside at
6 the deposition in accordance with Rule 28(a), Fed. R. Civ. P. The cost of the court reporter shall be
7 borne by the U.S. Attorney's Office.

8 6. The deposition shall be recorded by videotape. Prior to the conclusion of each
9 deposition, the deponent, or a party, may elect to have the deponent review the videotape record of
10 his deposition and to note any changes. Any errors or changes, and the reasons for making them,
11 shall be stated in writing and such writing shall be signed by the deponent.

12 7. The videotape operator shall select and supply all equipment required to videotape
13 and audiotape the deposition and shall determine all matters of staging and technique, such as
14 number and placement of cameras and microphones, lighting, camera angle, and background.
15 He/she shall determine these matters in a manner that accurately reproduces the appearance of the
16 deponent and assures clear reproduction of each deponent's testimony and the statements of counsel.
17 The deponent, or any party to the action, may place upon the record any objection to the videotape
18 operator's handling of any of these matters. Such objection shall be considered by the court in ruling
19 on the admissibility of the video and/or audiotape record. All such objections shall be deemed
20 waived unless made promptly after the objector knows, or has reasonable grounds to know, of the
21 basis of such objection.

22 8. The deposition shall be recorded in a fair, impartial, objective manner. The videotape
23 equipment shall be focused on the witness; however, the videotape operator may from time to time
24 focus upon charts, photographs, exhibits or like material being shown to the witness during the
25 deposition.

26 9. Before examination of the witness, the notary shall state on the video/audio record:
27 (a) his/her name and address; (b) the date, time and place of the deposition; (c) the name of the
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1 witness and the caption of the action; and (d) the identity of the parties and the names of all persons
2 present in the room. The notary shall then swear the witness on the video record. Further, at the
3 beginning of the examination by each counsel, the counsel shall identify himself/herself and his/her
4 respective client on the record. If more than one videotape is used, the notary shall repeat items (a),
5 (b) and (c) at the beginning of each new tape.

6 10. The videotape operator shall not stop the video recorder after the deposition
7 commences until it concludes, except, however, that any party may request a cessation for a brief
8 recess, which request will be honored unless another party objects and states the basis for said
9 objection on the record. Each time the tape is stopped or started, the videotape operator shall
10 announce the time on the record. If the deposition requires the use of more than one tape, the end
11 of each tape and the beginning of the next shall be announced orally on the video record by the
12 operator.

13 11. Testimonial evidence objected to shall be recorded as if the objection had been
14 overruled and the court shall rule on the objections prior to admitting that portion of the deposition.
15 The party raising the objection(s) shall be responsible for preparing a transcript for the court to
16 consider. All objections to the evidence presented shall be deemed waived unless made during the
17 deposition.

18 12. If requested by a party, the deposition testimony, if offered other than for
19 impeachment, may be presented in non-stenographic audio/visual format, in which case no transcript
20 need be prepared in advance of trial, unless otherwise ordered by the court. [See Fed. R. Civ. P.
21 32(c).]

22 13. Copies of all exhibits utilized during the videotaped deposition shall be marked for
23 identification during the deposition and filed along with the videotape.

24 14. At the conclusion of the deposition, the government and defense attorneys will advise
25 the material witness attorney if they intend to object to the release of the material witness. If the
26 parties do not object to the witness' release, the government and defense attorney will immediately
27 stipulate to an order to release the material witness from custody. The government's attorney will
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- 1 provide the material witness with a subpoena for the trial date, a travel advance fund letter, and
- 2 written authorization to enter the United States to testify at trial.

3 15. If either party objects to the release of the material witness, the objecting party must
4 immediately request in writing a hearing on the issue before the district court within a reasonable
5 time after the deposition is concluded. At the hearing, the objecting party must be prepared to show
6 why the release of the material witness is not appropriate under 18 U.S.C. § 3144. If, after the
7 hearing, the court decides to release the material witness, the material witness attorney should file
8 the witness release order immediately. Again, the government's attorney must serve the witness with
9 a trial subpoena, a travel fund advance letter, and written authorization to legally enter the United
10 States to testify at trial before the material witness is released.

11 16. Upon request by either party, the videotape operator shall provide a copy of the
12 videotape deposition to the requesting party at the requesting party's expense. After preparing the
13 requested copies, if any, the videotape operator shall turn the original videotape over to the notary
14 along with a certificate signed by the videotape operator attesting that the videotape is an accurate
15 and complete record of the deposition.

16 17. The notary shall file this original tape, along with the any exhibits offered during the
17 deposition, with the court in a sealed envelope marked with the caption of the case, the name of the
18 witness and the date of the deposition. To that envelope, the notary shall attach the sworn statement
19 that the videotape is accurate and complete record of the recorded deposition and certification that
20 the witness was duly sworn by the officer.

21 18. To the extent that the procedures set forth herein for the videotaping vary from those
22 set forth in Rules 28 and 30 F.R.Civ.P., these variations are found to be for good cause shown as
23 allowed by F.R.Civ.P. 29.

24 19. Unless waived by the parties, the notary must give prompt notice to all parties of the
25 filing of the videotape record of the deposition with the court pursuant to Fed.R.Civ.P. 30(f)(3).

26 || It Is So Ordered.

27 || Dated: _____

United States Magistrate Judge